



**Kenya Union of Domestic Hotels, Educational Institutions, Hospitals
and Allied Workers (KUDHEIHA) v Tea Hotel Limited & 3 others (Civil
Application E002 of 2022) [2023] KECA 320 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 320 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E002 OF 2022
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
MARCH 17, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS (KUDHEIHA) APPLICANT**

AND

TEA HOTEL LIMITED 1ST RESPONDENT

MANAGEMENT OF TEA HOTEL 2ND RESPONDENT

**RAVJI DEVJI CHHABHADIA KANJI DEVJI CHHABHADIA
CHANDRAKANJI DEVJI CHHABHADIA SHASHIKANT KANJIBHAI
PINDORIYA 3RD RESPONDENT**

YASANGWAN HOLDINGS LIMITED 4TH RESPONDENT

*(An application for stay of execution and stay of further proceedings in the Employment
and Labour Relations Court at Kericho (H Wasilwa, J) pending appeal from
the ruling and order dated 18th January, 2022 in ELRC Cause No 10 of 2016)*

RULING

Background

1. Before us is a notice of motion dated January 24, 2022 and amended on March 21, 2022, brought under rule 5(2) (b) of the *Court of Appeal Rules*. The applicant, Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) seeks in the main:
 - a. That pending the hearing and determination of this application there be an injunction pending the hearing and determination of the intended appeal restraining the Land Registrar, Kericho



County from cancelling the entries on LR No Kericho Municipality Block 4/295 measuring 5.831 acres (the suit property) ;

- b. That pending the hearing and determination of the instant application there be an injunction pending the hearing and determination of the intended appeal restraining the Land Registrar Kericho County from implementing the order setting aside the purported sale and eventual transfer of the suit property to Ravji Devji, Kanji Devji Chhabhadia, Shashikant Kanjibhai Pindoriya, (the 3rd respondents);
- c. That pending the lodgement, hearing and determination of the intended appeal there be a stay of the implementation of ruling and orders of Employment and Labour Relations Court (ELRC) (Wasilwa, J) delivered on January 18, 2022 restraining the Land Registrar, Kericho County from cancelling the entries on the suit property;
- d. That pending the lodgement, hearing and determination of the intended appeal, there be a stay of the implementation of the ruling and orders of the Wasilwa, J, restraining the Land Registrar, Kericho County from setting aside the purported sale and eventual transfer of the suit property to the 3rd respondents;
- e. That pending the lodgement, hearing and determination of an appeal from the ruling and orders of Wasilwa, J, this Court be pleased to grant a stay of execution of the impugned ruling and orders;
- f. That pending lodgement hearing and determination of an appeal from the ruling and orders of Wasilwa, J this Court be pleased to grant a stay of any further proceedings in the said suit;
- g. That the orders issued be enforced by the Officer Commanding Police Division (OCPD) in charge of Kericho Police Station with security reinforcement of the Officer Commanding Station (OCS) Nyagacho Police Station and OCS Brooke Police station;
- h. That this Court be pleased to grant any other orders that it deems mete and just; and
- i. That the costs of and incidental to this application abide the outcome of the said appeal.

Tea Hotel Limited, The Management of Tea Hotel, and Yasangwan Holdings Limited are the 1st, 2nd and 4th respondents respectively.

2. The application is based on the grounds *inter alia* that the learned Judge erred in law and fact: (a) in issuing extremely adverse orders against the applicant's members (formerly the 1st and 2nd respondent's employees) and its execution is untenable and agonizing which is against principles that provide for protection of employees' rights; (b) in assuming jurisdiction in hearing and determining matters in the application dated April 26, 2021 which fell within the exclusive preserve of the Environment and Land Court (ELC); (c) and by sitting on review/appeal of the decision of Monica Mbaru, J sitting in the same court with concurrent jurisdiction.
3. The application is supported by the grounds on its face and an affidavit sworn on March 21, 2022 by Ruth Ngelechei, the applicant's branch secretary. The applicant has also annexed a copy of the impugned ruling, a notice of appeal against the said ruling dated January 19, 2022, and a draft memorandum of appeal dated January 24, 2022. Having lodged the notice of appeal within 14 days of the judgment and decree pursuant to rule 77 of the [Court of Appeal Rules](#), the applicants contend that this Court is properly seized of the application. See [Halai & another v Thornton & Turpin \(1963\) Ltd](#) [1990] KLR 365.



4. The applicant contends that it has an arguable appeal, having raised substantial grounds as set out in the draft memorandum of appeal. The applicant relies on the case *Transouth Conveyors Ltd v Kenya Revenue Authority & another* [2007] eKLR. The draft memorandum of appeal raises grounds of appeal *inter alia* that the learned Judge erred: in assuming jurisdiction in hearing and determining matters which fell within the exclusive preserve of the ELC; by sitting on appeal against the decision of a judge of concurrent jurisdiction; and by disregarding the rules of *res judicata*.
5. On the question whether the appeal will be rendered nugatory if the orders sought are not granted, the applicant submits that if an order of stay is not granted, entries relating to the registration of the 3rd respondents as the owners of the suit property will be cancelled; that the Deputy Registrar of the trial court signed the transfer documents in respect of the suit property in favour of the 3rd respondents as purchasers following court orders dated November 4, 2019 and November 20, 2019; that in effect, the 3rd respondents will demand a refund of the purchase price, legal fees from all counsel who have been on record, auctioneer's fees, statutory expenses incurred as well as damages; and that some of the applicant's members are deceased, while others are old and frail and in the circumstances, a refund will be impractical; that in the event that the orders sought are not granted and the appeal succeeds, the applicant will be unable to recover the monies and will suffer damage, injury and irreparable harm which cannot be compensated in monetary terms as the applicant will not be in a position to refund the colossal amount. Reliance was placed on *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.
6. The applicant averred that absent stay, it will suffer substantial loss as the execution of the impugned ruling and orders of the ELRC will in effect reverse the whole transaction involving the sale of the suit property sold by public auction to the 3rd respondents who will demand a refund of the purchase price from the applicants whose members have been paid their dues some of who cannot be traced.
7. There was no replying affidavit filed by any of the respondents despite service.

Submissions by Counsel

8. The motion came up for hearing before us on a virtual platform. Learned counsel, Mr Kemboi, appeared for the applicant, Mr Midenga appeared for the 1st and 2nd respondents, Mr Menezes appeared for the 3rd respondents while Ms Sigira appeared for the 4th respondent. The application was heard by way of written submissions with oral highlighting.
9. Mr Kemboi submitted that the intended appeal is arguable with reasonable chances of success as it concerns 78 employees of the 1st and 2nd respondents who were declared redundant and have not yet been paid their salary arrears, redundancy package and retirement benefits. Counsel challenged the jurisdiction of the ELRC in hearing and determining a matter which falls under the purview of the ELC.
10. Mr Menezes supported the application and submitted that the intended appeal is arguable; that the substantive appeal, Civil Appeal No Nakuru E022 of 2022 has been filed; and that the learned Judge of the ELRC had no jurisdiction to hear and determine matters which fell under the purview of the ELC.
11. Counsel further submitted that upon the issuance of a certificate of sale to the 3rd respondents on November 6, 2019, the sale of the suit property was made absolute and the equity of redemption was therefore extinguished. Further, that the learned Judge erred in failing to find that the 3rd respondents were innocent purchasers for value without notice. Counsel further argued that the 3rd respondents stand to suffer prejudice if the orders sought are not granted as they paid the purchase price in respect of the suit property yet they have not obtained possession thereof.



12. Mr Midenga opposed the application and submitted that the intended appeal is not arguable. Counsel contended that the ELRC had the jurisdiction to hear and determine the matter before it as it was sitting on execution proceedings. Counsel further submitted that the intended appeal will not be rendered nugatory as the application has been overtaken by events as a decision dated July 8, 2021 ordered that titles revert to the original owners and the suit property has therefore changed character. Counsel submitted that this decision has not been appealed against.
13. Ms Sigira opposed the application and submitted that the application has been overtaken by events and that the ELRC had no jurisdiction to hear and determine the matter. Counsel urged us to dismiss the application with costs.

Determination

14. We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction of this Court under Rule 5 (2) (b) of the Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. See the case of *Trust Bank Limited & Another v Investech Bank Limited & 3 Others* [2000] eKLR where the Court delineated its jurisdiction in such an application as follows:-

“The jurisdiction of the Court under rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put it another way, it is not frivolous and secondly that unless he is granted a stay, the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

15. In considering the twin principles set out above, we are cognizant of the fact that to benefit from the discretion of this Court, both limbs must be demonstrated to the court's satisfaction. On the first principle, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant deserving ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR where the Court described an arguable appeal in the following terms:

“vii)An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. viii) In considering an application brought under rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

16. We have carefully considered the grounds set out in the motion and the memorandum of appeal. In our view, it is arguable inter alia whether the learned Judge of the ELRC had jurisdiction to hear and determine a matter pertaining to land. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
17. On the nugatory aspect, the issue is whether the appeal, should it succeed, will be rendered nugatory if we decline to grant the orders sought. From the record, the Land Registrar, Kericho, may proceed to cancel the entries made in the Land Register in respect of the suit property made in favour of the 3rd respondents. Further, the cancellation of the registration of title in favour of the 3rd respondent may occasion the applicants' irreparable damage as the applicant will have to refund the 3rd respondents in



excess of Kshs 115,000,000.00 being the purchase price in respect of the suit property. It is notable that counsel for the 1st and 2nd respondents and counsel for the 4th respondent who opposed the application submitted that the application has been overtaken by events but did not, however, produce any evidence in support of that submission.

18. As has been held by this Court in various cases such as *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *Oraro & Rachier Advocates v Co-operative Bank of Kenya Limited* [2002] eKLR a stay of execution may be granted where there are particular circumstances in a case warranting grant of stay. In the circumstances, we find that the appeal will be rendered nugatory, if we decline to grant the orders sought and the appeal succeeds.
19. Based on the findings above, we have come to the conclusion that the applicant has established the twin principles required in an application under Rule 5(2)(b) of the *Court of Appeal Rules*. Accordingly, we grant a stay of execution of the ruling and orders of the ELRC (Wasilwa, J) delivered on January 18, 2022 and a stay of further proceedings in ELRC Cause No 10 of 2016 pending the hearing and determination of the intended appeal.
20. The upshot is that the application dated March 21, 2022 is allowed.
Costs shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

K. M'INOTI

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

